88-1051

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD DENNIS JACKS, JR.,

Petitioner,

v.

JACK DUCKWORTH, Superintendent, Indiana State Prison, and INDIANA ATTORNEY GENERAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where Petitioner presented "a fairly significant amount of probative evidence, including testimony from two experts that he was insane at the time of the shooting,"[1] and "both his claims of constitutional error go to issues directly related to the jurors' consideration of his insanity defense,"[2] whether the District Court's refusal to consider the merits of Petitioner's habeas corpus petition was improper, under the standards set by this Court in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) ("ends of justice"—"colorable showing of factual innocence"), due to significant, intervening changes in the law after denial of his previous habeas petitions, with respect to the following issues:

A. *Doyle* error: Whether Petitioner was denied a fair trial by use of his invocation of right to counsel as evidence of sanity, both via evidence and prosecutorial argument.[3] While the Seventh Circuit had held there was no violation of constitutional rights as per *Doyle v. Ohio*, 426 U.S. 610 (1976),[4] this Court's subsequent decision of *Wainwright v. Greenfield*, 474 U.S. 184 (1986)—holding (after denial of Petitioner's second habeas petition) that post-*Miranda*

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[1] *Jacks v. Duckworth* (*Jacks III*), 857 F.2d 394, 400 (7 Cir. 1988), No. 87-1327, Sl. Op. p. 11. (App. A, p. App. 11)

[2] *Ibid.*

[3] Both evidence, ["As regards whatever happened this evening, I want to talk to my attorney." (Tr. 596)], and prosecutorial argument relying on Petitioner's invocation of rights as evidence of sanity, (Tr. 611), was presented to the jury.

[4] *Jacks v. Duckworth* (*Jacks I*), 651 F.2d 480 (7 Cir. 1981); *accord*, *Sulie v. Duckworth*, 689 F.2d 128 (7 Cir. 1982).

request to talk to attorney could not be used at trial as evidence of sanity—requires consideration of merits of his third habeas petition.[5]

B. *Sandstrom* error: Whether Petitioner's conviction violates due process, for it rests on improper instructions[6] which unconstitutionally shifted the burden of proof and diluted the presumption of innocence, allowing the jury to presume essential elemental facts against him without proof, where "intent" was a disputed issue, in violation of due process principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979). Intervening decisions of *Connecticut v. Johnson*, 460 U.S. 73 (1983), and *Francis v. Franklin*, 471 U.S. 307 (1985), demonstrate the instructions in this case are not harmless error,[7] and require consideration on the merits of the instructional issue in the habeas petition.

2. Under the same circumstances outlined in Question 1 above: Whether the Seventh Circuit's decision that such errors were "harmless" conflicts with this Court's hold-

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[5] While the District Court refused to reach the merits, (see App. C), the Seventh Circuit—based on *Wainwright v. Greenfield*, *supra*—necessarily determined a constitutional error occurred, (857 F.2d at 401; App. A, p. App. 13), but found the error "harmless." *Id.* at 402; App. A, p. App. 15. Post-*Wainwright* decisions from other Circuits demonstrate such error cannot properly be deemed "harmless"—particularly in context with the *Sandstrom* error simultaneously claimed. (See Question 2.)

[6] The instructions complained of are set out at pp. 7-8, *infra*; also, they appear in *Jacks I*, 651 F.2d at 490-91 (App. C to majority opinion).

[7] Post-*Francis* decisions from other Circuits, called to the Seventh Circuit's attention, demonstrate the instructional errors cannot be deemed "harmless" in context. (See pp. 18-19, *infra*.)

ings in *Wainwright v. Greenfield*, *supra*, and *Francis v. Franklin*, *supra*, and considering also the seminal "harmless error" decision of *Chapman v. California*, 386 U.S. 18 (1967); moreover, whether the "harmless error" determinations in Petitioner's case create a conflict between the Seventh Circuit on the one hand and the Sixth and Eleventh Circuits on the other [see *Alexander v. Foltz*, 838 F.2d 140 (6 Cir. 1988), *cert. denied, sub nom. Jabe v. Alexander*, 100 L.Ed.2d 604 (1988); *Bowen v. Kemp*, 832 F.2d 546 (11 Cir. 1987) (*en banc*), *cert. denied*, 99 L.Ed.2d 281 (1988); *Corn v. Kemp*, 837 F.2d 1474 (11 Cir. 1988)].

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

Both in the District Court and in the Court of Appeals, the parties to the proceeding are the same as in this Court.

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B. Petitioner's conviction violates due process, for it rests on improper instructions which unconstitutionally shifted the burden of proof and diluted the presumption of innocence, allowing the jury to presume essential, elemental facts against him without proof, where "intent" was a disputed issue, in violation of due process principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979), as further interpreted in *Connecticut v. Johnson*, 460 U.S. 73 (1983), *Francis v. Franklin*, 471 U.S. 307 (1985), and *Yates v. Aiken*, 484 U.S. ____, 98 L.Ed.2d 546 (1988)—and the error was not harmless. The Seventh Circuit's determination to the contrary conflicts with the foregoing decisions of this Court 14

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In The

Supreme Court of the United States

October Term, 1988

EDWARD DENNIS JACKS, JR.,

Petitioner,

v.

JACK DUCKWORTH, Superintendent, Indiana State Prison, and INDIANA ATTORNEY GENERAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Edward Dennis Jacks, Jr. (hereafter, defendant), prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on September 13, 1988.

REPORT OF OPINION DELIVERED IN COURT OF APPEALS

The opinion of the Court of Appeals for the Seventh Circuit, No. 87-1327, is reported as *Jacks v. Duckworth* (*Jacks III*), 857 F.2d 394 (1988). (App. A, pp. App. 1-19)

The District Court's Memorandum and Order entering the judgment reviewed by the Court of Appeals is set out as App. C to this Petition, pp. App. 21-24.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was delivered on September 13, 1988.

A timely petition for rehearing and for rehearing *en banc* was filed, and an order denying that relief was entered on November 2, 1988. (App. B, p. App. 20)

No order granting an extension of time within which to petition for certiorari has been requested or granted.

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by the terms of Title 28, United States Code, Section 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The Federal Habeas Corpus Statute, 28 U.S.C. § 2254(a), provides in pertinent part:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of any person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States."

Indiana Statutes Annotated, "Crimes," sec. 35-13-4-1 (effective 1973)—the statute under which defendant was tried and convicted—provides in pertinent part:

> "(a) Whoever kills a human being either purposely and with premeditated malice [or] . . . [inapplicable alternatives omitted] is guilty of murder in the first degree. . . ."

STATEMENT OF THE CASE

This is a Petition for Certiorari seeking review of the Seventh Circuit's affirmance of the District Court's denial of habeas relief to a State prisoner.

Petitioner, Edward Dennis Jacks, Jr. (hereafter, defendant) was found guilty by a jury of murdering his wife, following a trial at which he maintained he was not criminally responsible by reason of insanity at the time of the homicide. The Indiana Supreme Court affirmed the con-

viction and life sentence. *Jacks v. State*, 271 Ind. 611, 394 N.E.2d 166 (1979).

Defendant petitioned for writ of habeas corpus under 28 U.S.C. § 2254—asserting, *inter alia*, that he was denied due process (A) when the jury was exposed to evidence and prosecutorial argument that defendant was sane because after advisement of rights, he stated, "As regards whatever happened this evening, I want to talk to my attorney,"[8] and (B) because the jury improperly was instructed in derogation of the presumption of innocence by instructions which unconstitutionally shifted the burden of proof.[9] The District Court denied the petition, No. S 79-308, *Jacks v. Duckworth*, 486 F.Supp. 1366 (N.D. Ind. 1980), and the Seventh Circuit affirmed, No. 80-1639, *Jacks v. Duckworth* (*Jacks I*), 651 F.2d 480 (7 Cir. 1981).[10] This Court denied certiorari, 454 U.S. 1147, and denied leave to file petition for rehearing respecting denial of certiorari, 102 S.Ct. 2262 (1982).

Thereafter, this Court decided *Connecticut v. Johnson*, 460 U.S. 73 (1983), which supports defendant's position

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[8] Tr. 596 (evidence of invocation of right to counsel); Tr. 611 (prosecutor's argument that this demonstrates sanity).

Here and hereafter, the Transcript of Proceedings at Trial in the State trial court is referred to as "Tr.", and the Record on Appeal in No. 87-1327, as "R." This Record contains a single volume with entries R. 1 - R. 23, and a Supplement in a separate volume, R. 26.

[9] The instructions complained of—Court's Inst. No. 13 (Tr. 231), State's Inst. No. 4 (Tr. 273), and State's Inst. No. 5 (Tr. 274)—are set out at pp. 7-8, *infra*; they are also contained in *Jacks I*, *supra*, 651 F.2d at 490-91 (App. C to majority opinion).

[10] Affirmance was by majority opinion (Judges Cummings and Brown). Judge Swygert filed a dissenting opinion, 651 F.2d at 491.

on the instructional (*Sandstrom*) issue. Accordingly, defendant again filed for habeas corpus, No. S 83-171, requesting that this issue be reconsidered in light of the *Johnson* decision. The District Court denied the writ on November 28, 1983, and the Seventh Circuit on March 29, 1984 denied defendant's motion for certificate of probable cause to appeal therefrom.[11]

Subsequently, this Court decided (i) *Francis v. Franklin*, 471 U.S. 307 (1985), clarifying and expanding the due process principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979), demonstrating that the instructions here at issue are unconstitutional and prejudicial,[12] and (ii) *Wainwright v. Greenfield*, 474 U.S. 284 (1986), holding that use of post-*Miranda* invocation of rights as evidence of sanity violates due process of law.[13]

Accordingly, defendant again petitioned for writ of habeas corpus, No. S 86-460. (R. 1) The District Court denied the petition, solely on grounds it was a "successive" petition. (R. 18; App. C, pp. App. 23-24) The District Court granted a certificate of probable cause, (R. 22), and defendant filed his Notice of Appeal. (R. 26)

Although the Court of Appeals agreed that defendant's constitutional claims raise a colorable showing of factual innocence so as to justify consideration on the merits of

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[11] *Jacks v. Duckworth* (*Jacks II*), No. 83-3243 (unpublished order). See *Jacks v. Duckworth* (*Jacks III*), 857 F.2d at 398. The Court of Appeals' Order of March 29, 1984 (*Jacks II*) is reproduced in the District Court's Order of January 22, 1987 denying the instant (third) petition. (App. C, pp. App. 22-23)

[12] As argued in this Petition, pp. 14-18, *infra*, Point 2(B).

[13] As argued in this Petition, pp. 11-14, *infra*, Point 2(A).

this Petition,[14] albeit his third, (*Jacks III*, 857 F.2d at 400; App. A, p. App. 11), it concluded the constitutional errors asserted were "harmless," (*id.* at 401-04, App. A, pp. App. 13-19); this, despite that the Court opined:

> "If the jury was persuaded by this evidence [presented by defendant demonstrating his insanity], Jacks' insanity defense would have been as complete a defense as if he had proved he was in a foreign country on the day of the shooting." 857 F.2d at 400; App. A, p. App. 11.

STATEMENT OF FACTS

Facts Respecting Point 2(A) [Question 1(A)]:

On the night of his arrest for the murder of his wife on August 28, 1975, defendant was subjected to custodial interview with police. After he was advised of his constitutional rights, and engaged in certain preliminary conversation with police (which did *not* include reference to the homicide), defendant stated:

> "As regards whatever happened this evening, I want to talk to my attorney." (Tr. 596)

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[14] "While the exact contours of the 'colorable showing of factual innocence' standard have yet to be precisely defined, it appears that Jacks has made such a showing in this case. Throughout the history of this case, Jacks has contended that he was legally innocent by reason of insanity. To this end, he introduced a fairly significant amount of probative evidence, including testimony from two experts that he was insane at the time of the shooting. . . . [citation omitted] And *both his claims of constitutional error go to issues directly related to the jurors' consideration of his insanity defense.*" *Jacks III*, 857 F.2d at 400; App. A, p. App. 11. (Emphasis added.)

Defendant moved to suppress the use of this statement as evidence, on grounds such use violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel, both as guaranteed by Fourteenth Amendment due process of law. (Tr. 173, 549) The trial court denied the motion, allowing the jury to hear the statement without limitation. (Tr. 596)

The prosecutor, in argument, relied on defendant's invocation of rights as evidence of sanity. (Tr. 611)

Facts Respecting Point 2(B) [Question 1(B)]:

The following were among the instructions given to the jury:

Court's Instruction No. 13, read to the jury, states:

> "The Court instructs you that it is unlawful to intentionally commit an act forbidden by law which takes the life of another human being, unless the act is justified or legally excused, and the intent to do the act is criminal and imparts to said act the character of an offense, and one who violates the law, which he is conclusively presumed to know, cannot be heard to say that he had no criminal intent in doing the forbidden act.
>
> *Every man is presumed to intend the natural consequences of his acts*, and when one does an illegal act, he is responsible for all the consequences that legitimately flow therefrom." (Tr. 231) (Emphasis added.)

State's Instruction No. 4, read to the jury, states:

> "You are instructed that the criminal law is an expression of the community's conscience or moral sense. It is important, therefore, to remember that when considering a defense to criminal responsibility, the mere proof that a certain mental condition

existed at the time of the act, or that there is some causal connection between the mental state of the Defendant and the act itself is not enough. Rather there must be a showing that the defendant's mind was so affected, he failed to recognize and appreciate his duty to society or (*sic*) complying with its code of acceptable behavior or that appreciating such fact, he lacked the capacity to conform his conduct to such requirements.

You are further instructed that to be responsible within the meaning of the term 'criminal responsibility' means (1) to be able to recognize and discharge various duties (2) to be morally censurable for the voluntary breach of those duties and legally liable if their violations is (*sic*) forbidden by law." (Tr. 273)

State's Instruction No. 5, read to the jury, states:

"You are instructed that where a specific intent is required to make an act an offense, such as is the charge preferred against the defendant, it is not always possible to prove a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; bearing in mind *the presumption of law, that everyone is presumed to intend the natural and probable consequences of his voluntary acts*, unless the circumstances are such as to indicate the absence of such intent." (Tr. 274) (Emphasis added.)

While Nos. 4 and 5 were objected to at trial, defendant did not object to No. 13 before it was given;[15] however,

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[15] As is pointed out *infra*, fn. 18, p. 16, the "fundamental fairness" rule applied by Indiana State courts requires consideration of all the instructions now complained of as impacting on right

(Footnote continued on following page)

he assigned as error in the trial court, in his "Motion to Correct Errors," the giving of No. 13 as well as Nos. 4 & 5. (Tr. 11, 213, 906)

Facts Respecting Criminal Responsibility And Intent:

The evidentiary matters in the case respecting criminal responsibility (sanity) and intent presented close questions for the jury. That defendant presented "a colorable claim of factual innocence" thereby is acknowledged by the Seventh Circuit in the opinion sought to be reviewed; see *Jacks III*, *supra*, especially language set out in fn. 14, p. 6, *supra*. The expert and lay evidence of mental state—on the basis of which the jury might not have convicted, had the errors complained of in this Petition not been committed—is set out as App. D, (pp. App. 25-26), for the Court's convenience, not repeated here to avoid unnecessary duplication.

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[15] *continued*

to a fair trial—even if there may be a technical "waiver" by lack of contemporaneous objection to any specific instruction.

And even if objection to No. 13 is deemed "waived," the *identical*, offensive presumption language—to which defendant *did* object—is also contained in No. 5, *viz.*: "Every man is presumed to intend the natural consequences of his acts, and when one does an illegal act, he is responsible for all consequences that legitimately flow therefrom." (From No. 13, Tr. 231) And from No. 5, Tr. 274: ". . . bearing in mind the presumption of law, that everyone is presumed to intend the natural and probable consequences of his voluntary acts . . . ."

REASONS FOR GRANTING THE WRIT

1. The "Ends of Justice" Require Determination on the Merits of the Issues Presented in Petitioner's Third Habeas Petition, For He Has Made a "Colorable Showing of Factual Innocence" (via Insanity Defense) Within the Standards Set Out by this Court in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

The Court of Appeals agreed that defendant's constitutional claims raise a colorable showing of factual innocence so as to justify consideration on the merits of the constitutional issues raised in this Petition under the "ends of justice" standard of *Kuhlmann v. Wilson*, *supra*. *Jacks III*, 857 F.2d at 400 (App. A, p. App. 11). However, because the District Court had held that under *Kuhlmann*, *supra*, interpreting *Sanders v. United States*, 373 U.S. 1, 16-17 (1963), the merits of this third habeas need not be reached because defendant did not make a "colorable showing of factual innocence," (R. 18; App. C), defendant initially demonstrates to Your Honors that the merits must be reached.

In the single aspect of the Court of Appeals' *Jacks III* opinion which we urge is a correct determination as to this case, the Seventh Circuit agreed with defendant's position that establishment of the insanity defense amounts to "factual innocence" despite that defendant did not deny committing the fatal act. The District Court's confusion of "commission of the homicide" with legal responsibility therefor resulted in that court's serious misapplication of the *Sanders-Kuhlmann* rationale.

2. On the Merits.

Prefatory Statement

Crucial to each of these grounds for federal habeas relief is the totality of the circumstances of this case—that is, that the sole issue for the jury's litigation, in context, was whether defendant was criminally responsible within the meaning of applicable "insanity" law. Thus, the impact of both of these serious, constitutional errors upon the jury's ability fairly and properly to determine this seminal issue, must be determinative. As is evident from consideration of the errors and the evidence, each of the constitutional errors eroded and prejudiced defendant's right to a fair jury determination of the only contested issue—*i.e.*, his criminal responsibility (sanity) or lack thereof. And each of the errors, contextually, necessarily aggravated the impact of the other.

A. Defendant's Invocation of Rights.

In addition to the offending evidence—"As regards whatever happened this evening, I want to talk to my attorney," (Tr. 596)—it is significant that the prosecutor expressly argued that defendant's responses in police custody negated his insanity defense. (See Tr. 611.) The evidence of defendant's invocation of rights after advisement of his rights was admitted without limitation (Tr. 596; see Tr. 173, 549.)

Allowing the jury to hear this evidence, especially with the aggravation of the prosecutorial argument, violated defendant's right to remain silent and his right to counsel, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution as incorporated into Fourteenth Amendment due process.

This Court's intervening decision of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), holds in no uncertain terms that use of a defendant's post-rights-warnings invocation of rights to rebut his insanity defense violates due process of law. The District Court, relying on the "successive" petition rationale, (R. 18; App. C, pp. App. 23-24), refused to consider the impact of this controlling decision upon the case at bar. And while the Court of Appeals considered the issue, it erroneously found the conceded error "harmless."

Wainwright v. Greenfield also lays to rest the argument that defendant did not exercise his right to remain silent because he did not remain completely mute; for this Court expressly held that for *Miranda* purposes, silence does not only mean muteness, but includes the statement of a desire to remain silent, as well as statement of a desire to remain silent until an attorney has been consulted. 474 U.S. at 295 n.13. At bar, that is precisely what happened; after preliminary custodial conversation with police following advisement of rights, wherein defendant did *not* discuss anything respecting his wife's death,[16] he invoked his rights to silence and counsel by telling the officers, "As regards whatever happened this evening, I want to talk to my attorney." (Tr. 596) Pursuant to *Wainwright v. Greenfield*, there is no doubt that this statement, in context, amounts to an invocation of the rights of which defendant had been warned. Therefore, using in evidence and in argument—as has been done at bar—the fact that defendant invoked his rights, for the purpose of attempting to rebut his insanity defense, is unconstitutional. As

[16] The entirety of the conversation—demonstrating that defendant did not discuss the homicide prior to the statement invoking his rights—is set out as App. A to the majority opinion in *Jacks I*, 651 F.2d at 488-89.

stated by this Court in this controlling, intervening decision:

> "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights under the State's assurance that the invocation of those rights will not be penalized." 474 U.S. at 295.

While defendant maintained in his original petition that constitutional principles of *Doyle v. Ohio*, 426 U.S. 610 (1976), applying *Miranda v. Arizona*, 384 U.S. 436 (1966), condemned the use to which his invocation of rights was put in his case, the majority in *Jacks v. Duckworth* (*Jacks I*), *supra*, opined that defendant in fact "did not remain silent" because he engaged in certain conversation with the police before making the statement herein complained of. 651 F.2d at 483. The intervening decision of *Wainwright v. Greenfield* holds that complete muteness is *not* a prerequisite for a finding that a person has invoked his constitutional rights. 474 U.S. 295 n.13.

The District Court's denial of the instant habeas—defendant's first since his original one to raise this issue—without consideration of the impact of *Wainwright v. Greenfield*, is contrary to constitutional principles set out in that decision, and at odds with the *Sanders* and *Kuhlmann* holdings discussed in Point 1, p. 10, *supra*, as to successive petitions.

And while the Court of Appeals did reach the merits of this issue, its finding that the conceded error was "harmless" is clearly wrong, and at odds with *Wainwright v. Greenfield* and with a number of Courts of Appeals decisions as to "harmlessness," discussed in Point 2(C), pp. 18-19, *infra*.

At this juncture, we remind that the *Wainwright/Doyle* error cannot be considered in a vacuum, but must be considered in context with the instructional errors asserted

in Point 2(B) of this Petition. See *Prefatory Statement*, p. 11, *supra*.

B. Instructions Shifting Burden of Proof and Diluting Presumption of Innocence.

(The instructions at issue are set out at pp. 7-8, *supra*, and in *Jacks I*, 651 F.2d at 490-91.)

The instant petition and the second petition both raised this issue, which was raised in the original petition. However, intervening between the filing of the original and the second petition was this Court's decision in *Connecticut v. Johnson*, 460 U.S. 73 (1983), and between the second and the instant petition, the decision in *Francis v. Franklin*, 471 U.S. 307 (1985). The District Court's denial of the second petition was based on its erroneous perception that defendant's "intent" was not a contested issue. And the Seventh Circuit's present finding that the instructions did not shift the burden of proof or dilute the presumption of innocence, is clearly wrong. (*Jacks III*, 857 F.2d at 403-04; App. A, pp. App. 16-19.)

Intent Was a "Disputed Issue" at Bar

The District Court's position that intent was *not* a disputed element, ignores that the insanity defense is exactly a disputation whether a defendant was legally capable of harboring that intent which renders a person's actions legally culpable.

Here, the medical evidence with respect to criminal responsibility (*i.e.*, sanity) and intent was widely divergent. (See App. D, p. App. 25, *infra*.)

In *this* case, a verdict of "not guilty" would have been equivalent to the jury's acceptance of the insanity defense. Under Indiana law, intent is one of the constituent ele-

ments of first-degree murder.[17] Improper jury instructions as to any essential element—including intent—which shift the burden of proof as to such element, are unconstitutional. *Mullaney v. Wilbur*, 421 U.S. 864 (1975).

The Instructions at Issue Were Unconstitutional and Prejudicial

The language which this Court held was constitutionally offensive in *Sandstrom v. Montana*, 442 U.S. 510 (1979), was: "The law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513. The instructions complained of herein contain this language, *twice*. (See pp. 7-8, *supra*.) The instruction condemned by this Court in *Sandstrom*, *supra*, left the jury free to utilize an unconstitutional presumption shifting the burden of proof. 442 U.S. at 526. Because the jury *could have* used an unconstitutional presumption, the instruction was unconstitutional. *Ibid.* Moreover:

> "[E]ven if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." *Id.* at 526. (Emphasis in original.)

The *Jacks I*'s majority's "bottom line" on the instructional issue was that any error was harmless because the evidence of guilt was overwhelming. *Jacks I*, 651 F.2d at 487. However, this position confuses commission of the act which caused death, with defendant's state of mind;

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[17] The statute under which defendant was tried—Ind. Stat. Ann., Crimes, sec. 35-13-4-1 (eff. 1973)—makes intent an element of first-degree murder. In pertinent part, it provides:

> "(a) Whoever kills a human being either purposely and with premeditated malice [or] . . . [inapplicable alternatives omitted] is guilty of murder in the first degree. . . ."

for no reasonable person could conclude that the evidence as to *intent* was overwhelming, as is evident from consideration of the testimony bearing on sanity/criminal responsibility set out in App. D, pp. App. 25-26.

Here, the language complained of in the instructions at issue deprived defendant of due process law, for the jury was left free to convict him on the basis of the presumption rather than on the basis of the evidence. See *Connecticut v. Johnson*, 460 U.S. 73, 85 (1983).[18]

After defendant's second petition was dismissed, this Court decided *Francis v. Franklin*, 471 U.S. 307 (1985). That decision should serve to convince that the majority in *Jacks I* was wrong in concluding that the instructions complained of did not shift the burden of proof. The late Judge Swygert's cogent dissent in *Jacks I*, like *Francis v. Franklin*, *supra*, recognized that the instructions at issue reversed the burden of proof on intent. See 651 F.2d at 493. We respectfully suggest that Judge Swygert's dissent foreshadows the *Francis* holding.

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[18] The requirement that the instructions be considered as a whole, see *Cupp v. Naughten*, 414 U.S. 141 (1973), negates the District Court's position and that of the Seventh Circuit *Jacks I* majority (651 F.2d at 485) respecting "waiver" as to Inst. 13; for the language of No. 13 is part of the context within which the instant instructional claim must be considered. See text of instructions, set out at pp. 7-8, *supra*.

Similarly, the *Jacks III* discussion based on "waiver" is equally erroneous. *Jacks III*, 857 F.2d at 403 n.1. (See also fn. 15, pp. 8-9, *supra*).

Moreover, under Indiana State law, errors of fundamental constitutional proportion are to be considered on review even if not raised at earliest opportunity at trial; such errors cannot be waived and can be raised at any time. See, *e.g.*, *Nelson v. State*, 274 Ind. 218, 408 N.E.2d 637 (1980); *Grier v. State*, 251 Ind. 214, 240 N.E.2d 494 (1968).

Pursuant to *Sandstrom* as construed in the light of *Johnson* and *Francis*, the instructions here at issue impermissibly diluted defendant's presumption of innocence and shifted the burden of proof to him on the issue of intent. In context, the constitutional error was not harmless.

Francis v. Franklin is, we submit, determinative. There, this Court held a jury charge unconstitutional, though the jury was instructed that the presumption was rebuttable. This decision eliminates the underpinning from the majority's decision in *Jacks I* respecting the instructional issue—that is, that the instructions at bar (supposedly) lacked the "mandatory flavor" of the *Sandstrom* instruction. 651 F.2d at 485-86. *Jacks III* took the same erroneous position. 857 F.2d at 402-04; App. A, pp. App. 16-19.

In *Francis*, this Court expressly held that despite language that the presumption was rebuttable, the instruction nonetheless was constitutionally infirm because it "relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous . . . [than a conclusive presumption], but it is no less unconstitutional." 471 U.S. at 317. This Court in *Francis* concluded:

> "Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause." *Id.* at 325.

So, too, should this Court conclude with respect to the instructions at bar.

A further, intervening decision of this Court is instructive: *Yates v. Aiken*, 484 U.S. ____, 98 L.Ed.2d 546 (1988), holding that *Francis v. Franklin* is applicable to a case pending on collateral review at the time of its decision. This leaves no room for doubt as to the applicability at bar of *Francis v. Franklin*.

In *Francis*, this Court agreed with the Court of Appeals' determination that the constitutional error was not harmless,[19] because intent was plainly at issue, and was not overwhelmingly proved by the evidence. 471 U.S. at 326. Similarly, this Court should conclude that the Seventh Circuit's determination that the instructions were not constitutionally offensive, was erroneous.

The instant decision flies in the face of this Court's decisions in *Johnson* and *Francis*, *supra*, not to mention *Sandstrom*. Certiorari should be allowed so that this Court may appropriately instruct the Seventh Circuit.

C. The Errors Were Not Harmless.

The Seventh Circuit's determination that the conceded *Doyle* error was harmless, and that the instructions complained of did not improperly and unconstitutionally shift the burden of proof as per *Sandstrom* (*i.e.*, that there was no prejudicial error), conflicts with the aforesaid decisions of this Court [*i.e.*, *Wainwright v. Greenfield*; *Connecticut v. Johnson*; *Francis v. Franklin*—all, *supra*] as heretofore mentioned, and runs afoul of the seminal "harmless error" decision of *Chapman v. California*, 386 U.S. 18 (1967). Moreover, this decision creates a conflict between the Seventh Circuit on the one hand, and the Sixth and

[19] The error of the "harmless error" aspect of the *Jacks III* determination is explicated in Point 2(C), pp. 18-20, *infra*.

Eleventh Circuits on the other. See *Alexander v. Foltz*, 838 F.2d 140 (6 Cir. 1988), *cert. denied, sub nom. Jabe v. Alexander*, 100 L.Ed.2d 604 (1988); *Bowen v. Kemp*, 832 F.2d 546 (11 Cir. 1987) (*en banc*), *cert. denied*, 99 L.Ed.2d 281 (1988); *Corn v. Kemp*, 837 F.2d 1474 (11 Cir. 1988).

It is not insignificant that in deciding *Wainwright v. Greenfield*, *supra*, this Court noted a previous conflict between the Circuits as to the *Doyle* error in the insanity context, as here; indeed, the Seventh Circuit was cited as an example of a Court of Appeals taking the [former, now-erroneous] view abolished in *Greenfield*, that there was no *Doyle* error. See *Greenfield*, *supra*, 474 U.S. at 289 n.4, citing *Sulie v. Duckworth*, 689 F.2d 128 (7 Cir. 1982), which expressly followed *Jacks I*. (See fn. 4, p. i, *supra*.)

Thus, *Jacks III* (the instant decision) is a throw-back to pre-*Greenfield* law; for while paying lip service to that decision in holding there was error at bar, the Seventh Circuit attempts to circumvent this Court's directives by irrationally concluding that the error was harmless.

The *Doyle* error cannot, we repeat and stress, be considered out of context with the instructions complained of; for it is the combination of evidence and argument as to defendant's invocation of right to counsel, together with instructions which denigrated burden of proof and presumption of innocence, that operate to deprive defendant of that fair trial to which he is constitutionally entitled by due process of law. The decisions from the Sixth and Eleventh Circuits cited above conflict with *Jacks III* as to the possibility that the instructional error can ever be harmless in the insanity/intent context—as at bar. Put those holdings together with a *conceded Doyle* violation as per *Wainwright v. Greenfield*, as we have at bar, and

no practicing lawyer could fail to conclude that defendant did not have a fair jury determination of the *only* contested issue—that is, his intent and mental state. In other words, the error(s) were *not* harmless. The *Jacks III* decision to the contrary perpetuates the folly begun in *Jacks I*; and it is obvious that the Seventh Circuit is not willing to re-think its position in light of this Court's intervening, controlling and/or instructive decisions.

One can only surmise that having once determined (albeit, 2 to 1; see fn. 10, p. 4, *supra*), that defendant was not denied a fair trial, the Seventh Circuit will not willingly back down. This Court should intervene.

CONCLUSION

Defendant remains incarcerated on the basis of a trial at which at least two egregious constitutional violations were committed, and he remains in custody in violation of his constitutional rights to remain silent, to invoke his right to counsel, to require proof beyond a reasonable doubt, and in violation of his constitutionally guaranteed presumption of innocence—all part and parcel of due process of law.

As the Seventh Circuit admitted, he has made a colorable showing of factual innocence.

The merits of the habeas petition, although petitioner's third, should have been reached by the District Court on the basis of the intervening Supreme Court decisions relied on in this Petition.

And, on the merits, this Court should issue the Great Writ.

* * *

Certiorari should be allowed to provide the federal courts with guidelines concerning the frequently-encountered, serious constitutional problems raised in this case, and to resolve a conflict between the Circuits by bringing the Seventh Circuit into line with the dictates of the Constitution as heretofore enunciated by this Court.

Moreover, this case would serve as a convenient vehicle for this Court's views on the role of the reviewing court in the habeas context.

Respectfully submitted,

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APPENDIX A

[Reported at 857 F.2d 394 (1988)]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1327

EDWARD DENNIS JACKS, JR.,

Petitioner-Appellant,

v.

JACK DUCKWORTH, Superintendent,
Indiana State Prison, and
INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 86-C-460—**Allen Sharp**, *Judge*.

ARGUED OCTOBER 1, 1987—DECIDED SEPTEMBER 13, 1988

Before CUDAHY and MANION, *Circuit Judges*, and WILL, *Senior District Judge*.*

MANION, *Circuit Judge*. Jacks appeals the district court's decision to deny his third petition for a writ of habeas corpus. We affirm.

* Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, Eastern Division, is sitting by designation.

I.

Edward Jacks, an Indiana arms dealer, returned from a business trip to Georgia upset that negotiations for a deal with a foreign government had fallen through. Upon returning, his wife informed him that she had filed for divorce and that she and the couple's two children had moved from the couple's house into an apartment. His wife subsequently returned to the house with the children to collect some clothing and belongings. Jacks greeted her at the front door with an assault rifle. She turned, trying to gather up the children as she fled. Jacks shot and killed her.

Jacks was charged with first degree murder and tried before a jury in the Superior Court of Elkhart County, Indiana. Jacks claimed that he was insane at the time of the shooting. The jury convicted Jacks of first degree murder and the trial court sentenced him to life in prison. He is currently incarcerated in Indiana.

Since being sentenced to life in prison, Jacks has launched several attempts to overturn his conviction. These attempts have included a direct appeal to the Indiana Supreme Court, three petitions for a writ of habeas corpus filed in the United States District Court for the Northern District of Indiana, an appeal filed in this circuit, an application for the issuance of a certificate of probable cause filed in this circuit, and a petition for a writ of certiorari filed in the United States Supreme Court. This continuing effort notwithstanding, Jacks remains incarcerated and he now appeals from the denial of his third petition for a writ of habeas corpus.

Jacks' numerous petitions and appeals have raised several constitutional grounds for overturning his conviction. Two of these grounds are relevant to the present appeal. The first ground concerns the admission of Jacks' post-*Miranda* warning request for an attorney as evidence of sanity. This request was part of a tape-recorded conversation between Jacks and Detective Sergeant Miller of the Elkhart County Sheriff's Department. At the beginning

of the conversation, Sergeant Miller informed Jacks of his *Miranda* rights. Sergeant Miller and Jacks then engaged in a conversation concerning, among other things, Jacks' arms business. After talking about Jacks' business, the following colloquy took place:

[Sergeant] Miller:	Do you know what has happened? Tonight?
Mr. Jacks:	I'm not exactly sure what happened.
[Sergeant] Miller:	You're not exactly sure. Have you been drinking?
Mr. Jacks:	As regards whatever happened this evening, I want to talk to my attorney.
[Sergeant] Miller:	Okay.

Miller and Jacks then continued their conversation but did not talk about the shooting.

At Jacks' criminal trial, the court allowed the state to introduce the initial portion of the taped conversation up to and including Jacks' statement that he wanted to talk to an attorney. The State introduced this portion of the taped conversation as evidence of Jacks' sanity at the time of the shooting, and in his closing argument, the prosecutor mentioned all the statements made by Jacks in this portion of the conversation, including Jacks' request for counsel. The trial court did not allow the remaining portion of the conversation to be admitted into evidence. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that police must cease questioning of arrested person after person invokes right to counsel). A transcript of the entire conversation is set forth in Appendices A and B to the majority opinion in *Jacks v. Duckworth*, 651 F.2d 480, 488-90 (7th Cir. 1981), *cert. denied*, 454 U.S. 1147 (1982). (For ease of reference, we refer to the opinion in Jacks' first appeal as *Jacks I*.) Jacks claimed that the admission of the initial portion of the taped conversation into evi-

dence, and the prosecutor's comment on the evidence, unconstitutionally penalized the exercise of his rights to remain silent and to counsel.

Jacks' second ground of constitutional error involves the trial court's instructions to the jury. Jacks' challenge to the instructions focused on State's Instruction No. 5, which stated:

> You are instructed that where a specific intent is required to make an act an offense, such as in the charge preferred against the Defendant, it is not always possible to prove a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; bearing in mind the presumption of law, that everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent.
>
> When an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the state in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done.

Jacks I, 651 F.2d at 491. At the time of Jacks' trial, the burden was on the State to prove Jacks' sanity beyond a reasonable doubt. *See Riggs v. State*, 264 Ind. 263, 265, 342 N.E.2d 838, 841 (1976). Jacks claimed that the instruction's language that "everyone is presumed to intend the natural and probable consequences of his voluntary acts" and that the "law presumes a criminal intent from an unlawful act knowingly done" violated his due process rights by creating a mandatory presumption of intent that shifted the burden of persuasion on an essential element of the crime from the State to Jacks.

Jacks unsuccessfully raised both these grounds of error on direct appeal to the Indiana Supreme Court, *Jacks v. State*, 271 Ind. 611, 394 N.E.2d 166 (1979), and on his first petition for a writ of habeas corpus, *Jacks v. Duckworth*, 486 F. Supp. 1366 (N.D. Ind. 1980). Jacks then appealed to this circuit.

On appeal, Jacks claimed that the introduction into evidence of his post-*Miranda* warning request to remain silent about the crime until contacting a lawyer and the prosecutor's comment on that evidence violated the rule set forth in *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that the use of post-*Miranda* warning silence as impeachment evidence against defendant violates due process), and *United States v. Hale*, 422 U.S. 171 (1975) (holding that prosecutor may not elicit evidence concerning defendant's post-*Miranda* warning silence). The court rejected this argument, concluding that neither *Doyle* nor *Hale* was applicable because Jacks had not, in fact, remained silent. The court indicated that Jacks' statement mentioning counsel should nonetheless have been kept out of evidence, but that the admission of that statement did not warrant overturning Jacks' conviction. In pertinent part the court reasoned:

> Certainly the reading of this one sentence to the jurors after they had been read the considerable forepart of petitioner's conversation with Officer Miller would be lost in all the rest of the evidence rather than cause them to convict. The trial judge left it in merely to mark the termination of the permissible evidence and that which became impermissible, he thought, after defendant first sought counsel. While it might have been better practice to suppress the sentence, certainly it was not so prejudicial a ruling as to constitute reversible error in view of the strong case against petitioner.

651 F.2d at 483.

Jacks also claimed on his first appeal to this circuit that the trial court's jury instructions violated his due process rights by creating a mandatory presumption against him

that shifted the burden of persuasion on the issue of intent from the State to Jacks. See *Sandstrom v. Montana*, 442 U.S. 510 (1979) (due process requires the State to prove every essential element of a crime beyond a reasonable doubt). The court disagreed. While recognizing that the instruction caused needless problems and should not be given in future cases, the court determined that the qualifying phrases in the instruction cured any problem with the "presumption" language. According to the court, the instruction did not contain a mandatory injunction to presume intent because "the jurors were told they could 'look to all the surrounding circumstances, including what was said and done in relation thereto' and that any presumption of 'a criminal intent from an unlawful act knowingly done' " existed only in the absence of "justifying or excusing facts." *Jacks I*, 651 F.2d at 485. The court also reasoned that the "qualifying phrase 'unless the circumstances are such as to indicate the absence of . . . intent' . . . nullified the mandatory flavor of the language condemned in *Sandstrom* . . . ." *Id.* at 485-86. Moreover, after exhaustively analyzing all the jury instructions read to the jury, the court held that when read in their entirety the instructions made plain that the State had the burden of persuasion on every essential element of the crime charged. *Id.* at 486-87. In any event, the court concluded, any error caused by the instructions was harmless.

After this court affirmed the district court's dismissal of Jacks' first habeas petition, the Supreme Court issued its decision in *Connecticut v. Johnson*, 460 U.S. 73 (1983). In *Connecticut v. Johnson*, a plurality of the Court stated that *Sandstrom* error could be considered harmless only in "rare situations" such as when intent is conceded by the defendant. *See* 460 U.S. at 87 (plurality). But see *Rose v. Clark*, 478 U.S. 570 (1986) (holding that *Chapman v. California*, 386 U.S. 18 (1967) standard for constitutional error applies to *Sandstrom* error). This prompted Jacks to file a second habeas petition claiming that the jury instructions at his trial unconstitutionally shifted the burden of proof and that such error could not be deemed harm-

less. The district court concluded that the petition did not raise any new issues and dismissed the petition under Rule 9(b) of the Rules Governing Section 2254 Cases. As an alternative holding, the district court reviewed the merits anew and held that *Connecticut v. Johnson* did not call into question the constitutionality of Jacks' conviction. The district court declined to issue Jacks a certificate of probable cause. *See* 28 U.S.C. § 2253.

Jacks then filed an application in the Seventh Circuit for the issuance of a certificate of probable cause. This circuit rejected the application stating:

> In consideration of the fact that this court [in *Jacks I*, 651 F.2d 480 (7th Cir. 1981)] has previously determined that the instructions did not unconstitutionally shift the burden of proof, and, in view of the fact that this court's harmless error analysis was an alternative holding, we find no substantive issue for review. Accordingly, the request for a certificate of probable cause is denied.

Jacks v. Duckworth (*Jacks II*), No. 83-3243 (7th Cir. March 29, 1984) (unpublished order denying application for certificate of probable cause).

Not satisfied with this circuit's previous dispositions of his case, Jacks filed a third petition for a writ of habeas corpus. This petition claimed that further review of his case was justified by recent decisions of the Supreme Court in *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (holding that post-*Miranda* warning invocation of *Miranda* rights could not be used as evidence of a person's sanity) and *Francis v. Franklin*, 471 U.S. 307 (1985) (holding that jury instructions that could lead a reasonable jury to conclude that the defendant had the burden of proof on an essential element of a crime violates due process). Applying the "colorable showing of factual innocence" standard for successive habeas corpus petitions set forth in the plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), the district court denied the petition. This appeal followed.

II.

On appeal, Jacks raises the same constitutional claims that this circuit has previously rejected on the merits. These are that his due process rights were violated: (1) by the admission of his post-*Miranda* warning statement that he wished to remain silent about the shooting until contacting an attorney; and (2) by the trial court's jury instructions on the issue of intent. Accordingly, we must examine whether the district court properly refused to consider the merits of Jacks' third habeas corpus petition.

The doctrine of res judicata has no applicability in a habeas corpus proceeding. *Sanders v. United States*, 373 U.S. 1, 8-9 (1963); *St. Pierre v. Helgemoe*, 545 F.2d 1306, 1307 (1st Cir. 1976). Repetitive petitions for habeas corpus, however, are limited by 28 U.S.C. § 2244(b). This statutory provision states:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Consistent with § 2244(b), Rule 9(b) of the Rules Governing Section 2254 Cases provides:

> **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the

> prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

"As these provisions make clear, the law disfavors successive habeas petitions, and while the courts should consider them only in 'rare instances,' they do possess the 'discretion to entertain' successive petitions." *Jones v. Henderson*, 809 F.2d 946, 950-51 (2d Cir. 1987) (quoting Advisory Committee Note to Rule 9(b) of the Rules Governing Section 2254 Cases).

The determination of whether a petitioner is precluded from relitigation on the merits of a previously rejected petition is made by resort to the three-step test set forth in *Sanders*. In *Sanders*, the Court stated that:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

373 U.S. at 15 (footnote omitted). *See also United States ex rel. Townsend v. Twomey*, 452 F.2d 350 (7th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972); *Jones v. Henderson*, 809 F.2d at 951.

Both grounds of constitutional error asserted in Jacks' third petition were raised and rejected in previous habeas corpus petitions. Thus, we focus on whether Jacks satisfied his burden of showing that the "ends of justice" warrant a fresh look at his claims. *Sanders*, 373 U.S. at 17 (petitioner has burden of establishing that "ends of justice" require reconsideration of the previously adjudicated claim); *Townsend*, 452 F.2d at 355 (same). We review a district court's determination on this issue for abuse of discretion. *Townsend*, 452 F.2d at 357.

The question of whether the "ends of justice" warrants redetermination of a previously adjudicated habeas corpus claim is not subject to any hard and fast rules. As the Court noted in *Sanders*, the "ends of justice" test is one that "cannot be too finely particularized." 373 U.S. at 17. Nonetheless, the Court did point out two general categories under which a petitioner could proceed. First, "[i]f factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair . . . ." *Id.* at 16-17. Second, "[i]f purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Id.* at 17.

In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), a majority of the members of the Court expressly added another consideration to the "ends of justice" analysis, that is, whether the petitioner has made a "colorable showing of factual innocence." In *Kuhlmann*, a petitioner, whose claim had been rejected in a prior habeas corpus petition, sought relief on the ground that there had been an intervening change in the law. Justice Powell, writing for a four-member plurality, stated that "the 'ends of justice' *require* federal courts to entertain such petitions *only* where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." 477 U.S. at 454 (emphasis added). Although a majority of the members of the Court did not join in this portion of Justice Powell's opinion, Justice Stevens wrote separately and agreed with the plurality that a district court could properly take into account whether a petitioner set forth a " 'colorable claim of factual innocence.' " 477 U.S. at 476 (Stevens, J., dissenting). Justice Stevens departed from the plurality on this issue, however, in that he concluded that advancing a "colorable claim of innocence" was "not an *essential* element of every just disposition of a successive petition . . . ," but rather was "one of the facts that *may* properly be considered" in the "ends of justice"

analysis. *Id.* (emphasis added). Thus, the common ground of the plurality decision and Justice Stevens' dissent is that a district court *may* take into account whether a successive petitioner established a "colorable showing of factual innocence" when determining whether a plaintiff has satisfied his burden of establishing that the "ends of justice" warrant relitigation of the merits. *See Jones*, 809 F.2d at 951-52.

While the exact contours of the "colorable showing of factual innocence" standard have yet to be precisely defined, it appears that Jacks has made such a showing in this case. Throughout the history of this case, Jacks has contended that he was legally innocent by reason of insanity. To this end, he introduced a fairly significant amount of probative evidence, including testimony from two experts that he was insane at the time of the shooting. If the jury was persuaded by this evidence, Jacks' insanity defense would have been as complete a defense as if he had proved he was in a foreign country on the day of the shooting. *See Riggs v. State*, 264 Ind. 263, 265, 342 N.E.2d 838, 841 (1976). And both his claims of constitutional error go to issues directly related to the jurors' consideration of his insanity defense. We need not reach any definitive resolution of this issue, however, because Jacks' petition was properly dismissed whether or not he presented a "colorable showing of factual innocence." Jacks claims that the "ends of justice" warrant a redetermination of his claims because intervening changes in the law establish the unconstitutionality of his conviction. As we explain below, however, there have been no intervening changes in the law that call into question the constitutionality of his conviction.

A. *Doyle* Error.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held that the state violated a criminal defendant's due process rights by using the defendant's post-*Miranda* warning silence for impeachment purposes against him at trial. The Court gave two reasons for this holding. First,

the Court stated that a person's decision to remain silent after being advised of his *Miranda* rights is "insolubly ambiguous" evidence. *Id.* at 617. Second, and most important, the Court stated that using a person's post-*Miranda* warning silence against him for impeachment purposes would be fundamentally unfair given that the *Miranda* warnings carry with them an implicit assurance that a person will not be penalized at trial for the exercise of those rights.

After *Doyle*, there was a conflict among the circuits as to whether a criminal defendant's post-*Miranda* warning exercise of *Miranda* rights could be introduced at trial as evidence of the person's sanity. This circuit held that a person's post-*Miranda* warning request for counsel soon after the commission of the crime was admissible to show the defendant's sanity at the time he committed the crime. *See Sulie v. Duckworth*, 689 F.2d 128 (7th Cir. 1982), *cert. denied*, 460 U.S. 1043 (1983). *Accord United States v. Trujillo*, 578 F.2d 285 (10th Cir.), *cert. denied*, 439 U.S. 858 (1978). Other courts came to a contrary conclusion. *See Greenfield v. Wainwright*, 741 F.2d 329 (11th Cir. 1984), *aff'd*, 474 U.S. 284 (1986); *State v. Burwick*, 442 So.2d 944 (Fla. 1983), *cert. denied*, 466 U.S. 931 (1984). *Accord Sulie*, 689 F.2d at 131-33 (Cudahy, J., dissenting).

The Supreme Court resolved this conflict in *Wainwright v. Greenfield*, 474 U.S. 284 (1986). In *Wainwright*, the Court held that a criminal defendant's post-*Miranda* warning request to talk to an attorney before making any statement could not be used at trial as evidence of the defendant's sanity.

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those

> rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Id. at 292. In addition to resolving the issue of whether the exercise of *Miranda* rights could be used as evidence of sanity, the Court emphasized in a footnote that *Doyle* "silence" was broader than mere muteness but also included statements that expressed a desire to remain silent, "as well as of a desire to remain silent until an attorney has been consulted." *Id.* at 295 n.13.

Under *Wainwright*, there is no doubt that the admission of Jacks' statement that "[a]s regards whatever happened this evening, I want to talk to my attorney," constituted a due process violation. It is equally clear that *Wainwright v. Greenfield* constitutes an "intervening change in the law" as applied in this circuit. This "intervening change in the law," however, does not affect the validity of Jacks' conviction. While *Sulie* held that the use of a post-*Miranda* warning request for counsel as evidence of sanity was constitutionally permissible, *Sulie* was not decided until after this circuit affirmed the denial of Jacks' first habeas corpus petition. On the appeal of the denial of the first habeas petition, this circuit indicated that the challenged statement should have been excluded but determined that any possible error was harmless. *See Sulie*, 689 F.2d at 129 ("[*Jacks I*, 651 F.2d at 482-83] lays heavy emphasis on the harmlessness of the alleged error in the circumstances of that case, and we are less certain that if there were error here it was harmless.").

In an attempt to avoid the harmless error holding of *Jacks I*, Jacks relies heavily upon the fact that *Jacks I* held that no *Doyle* violation occurred because Jacks did not remain silent after being given the *Miranda* warnings. *Wainwright v. Greenfield* now makes clear that a statement that a person does not wish to speak until an attorney has been consulted also constitutes "silence" under *Doyle*. Thus, in light of *Wainwright v. Greenfield*,

Jacks' statement can be viewed as implicating both his right to remain silent and his right to consult counsel. This does not, however, alter *Jacks I*'s harmless error analysis.

The fact that Jacks' post-*Miranda* warning statement implicated his right to silence as well as his right to counsel is simply another ground to keep out the same statement. It does not impact on the harm actually caused him by the statement's admission. Moreover, assuming that it would be appropriate to revisit the harmless error analysis on this issue, our conclusion would be no different. The admission into evidence of the challenged statement was harmless beyond a reasonable doubt. See *Fencl v. Abrahamson*, 841 F.2d 760 (7th Cir. 1988). Jacks' statement that "[a]s regards whatever happened this evening, I want to talk to my attorney," was simply one of many lucid statements made by Jacks in the portion of the taped conversation admitted into evidence. In addition, the prosecutor did not dwell on this statement in closing argument but rather mentioned the statement along with all the other statements made in the admitted portions of taped conversation. More important, the taped conversation was simply a small portion of a large amount of evidence going to the issue of Jacks' sanity. The State presented the testimony of eleven lay witnesses that indicated that Jacks was sane before, during, and after the shooting. Two experts testified that in their opinions, Jacks was sane and capable of forming the requisite criminal intent at the time of the shooting. An electroencephalogram technologist testified that, upon his return for a second electroencephalogram, Jacks told her that the first test did not show his insanity as his counsel had hoped and that he did not want to go along with an insanity defense. To counter the State's case, Jacks presented a considerable amount of probative evidence designed to show he was insane at the time of the shooting, including his own testimony and the testimony of two experts who testified that, in their opinions, Jacks was incapable of forming the requisite criminal intent. Jacks also

argued that much of the State's evidence reinforced this conclusion. In short, the challenged statement was a small part of a taped conversation which was in turn a small part of the entire evidence on the issue of insanity. While it was error to admit the statement, its admission was harmless error.

B. *Sandstrom* Error.

Jacks' second ground for seeking habeas corpus relief is that the trial court's instructions unconstitutionally shifted the burden of proof on an essential element of the crime from the State to Jacks. See *Sandstrom v. Montana*, 442 U.S. 510 (1979). As discussed earlier, this contention was rejected by this circuit in *Jacks I*, 651 F.2d at 485-87. Because of *Jacks I*'s disposition of this issue, this circuit subsequently denied Jacks' application for a certificate of probable cause to appeal the district court's denial of Jacks' second habeas petition. Nonetheless, Jacks comes before us a third time on this same issue. According to Jacks, the Supreme Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985) "should serve to convince this Court that the majority in [*Jacks I*] was wrong with respect to whether the instructions complained of shifted the burden of proof." Appellant's Brief at 23. We disagree.

In *Francis*, a state prisoner sought habeas corpus relief on the ground that the trial court's instruction to the jury violated the due process requirement that a state prove every element of a crime beyond a reasonable doubt. The challenged jury instructions stated that: "(1) '[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted'; and (2) '[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.' " 471 U.S. at 309. The Supreme Court stated that, unless corrected by other instructions, these instructions violated due process because they created a mandatory rebuttable presumption on the issue of intent that shifted the

burden of persuasion on the intent issue to the defendant. *Id.* at 318. The Court then examined the rest of the jury instructions in that case to see if the other instructions sufficiently clarified the prosecution's burden so that a reasonable juror could not have understood the challenged instructions to have shifted the burden of persuasion to the defendant. Finding that the other instructions did not, the Court held that the prisoner's due process rights were violated.

Despite Jacks' arguments to the contrary, *Francis v. Franklin* does not constitute an intervening change in the law warranting relitigation of his claim. As the Court noted in its opinion, *Franklin* did not extend prior law, but rather involved the application of the principles set forth in *Sandstrom* to the circumstances of that case. 471 U.S. at 317 n.5. Nor did *Franklin* deviate from the Court's well-settled precedent that the constitutionality of particular instructions are not reviewed in isolation but rather are examined in the context of all the instructions given to the jury. *See Cupp v. Naughten*, 414 U.S. 141 (1973).

While certainly not to be emulated, the challenged instruction around which Jacks centers his argument, State's Instruction No. 5,[1] is different from those found unconsti-

---

[1] On this appeal, Jacks also complains that another instruction given at trial, Court's Instruction No. 13, violated his due process rights. Like State's Instruction No. 5, Court's Instruction No. 13 contained language referring to an individual presuming "to intend the natural consequences of his acts." *See Jacks I*, 651 F.2d at 490. *Jacks I*, however, held that Jacks waived his right under Indiana law to object to that instruction and is barred from seeking habeas relief on that ground by his failure to show cause for and prejudice from his failure to object at trial. *See Jacks I*, 651 F.2d at 485. Jacks tries to make an end run around that ruling by stating that *Jacks I* improperly refused to consider that instruction as part of the "context" for examining any error caused by State's Instruction No. 5. Jacks ignores the court's alternative holding in *Jacks I* that any error in Court's Instruction No. 13 was cured by another of the trial court's instructions.

(Footnote continued on following page)

tutional in *Sandstrom* and *Francis*. As *Jacks I* noted, State's Instruction No. 5 contained qualifying language that "nullified the mandatory flavor of the language condemned in *Sandstrom* . . . ." 651 F.2d at 485-86. The instruction told the jury that they could look to all the surrounding circumstances and that the "presumption" existed only for "voluntary acts" and "unlawful act[s] . . . proved to be knowingly done." The "presumption" language was further qualified by the phrases "unless the circumstances . . . indicate the absence of such intent" and "in the absence of justifying or excusing facts . . . ." Jacks claimed he was insane at the time of the shooting, so that none of his acts could be considered "knowing" or "voluntary." Furthermore, if the jury believed the slightest shred of his evidence concerning the surrounding "circumstances" or "justifying or excusing facts" there was no "presumption" under the instruction even for a "knowing" or "voluntary" act. *See Dean v. Young*, 777 F.2d 1239, 1244 (7th Cir. 1985) (construing similar instruction as constitutional under *Francis* where defendant claimed to be under the influence of LSD at time of the crime), *cert. denied*, 475 U.S. 1142 (1986). On the other hand, if the jury did not believe any of the evidence of insanity, Jacks essentially had no defense to the government's overwhelming case. *See id.*

---

[1] *continued*

Jacks further contends on this appeal that the State's Instruction No. 4 constituted error under *Francis*. Jacks, however, does not bother to enlighten us as to why this instruction violated his constitutional rights. We are left to assume that his objections are to language in the instructions that "when considering a defense to criminal responsibility . . . there must be a showing that the" defendant was insane. *See Jacks I*, 651 F.2d at 490. Such undeveloped arguments are deemed waived on appeal. In any event, we find no reversible error in the instructions. State's Instruction No. 4 made clear that in order to be criminally responsible a person had to be sane. Moreover, the trial court made plain to the jury that the State had the burden of proving Jacks' sanity beyond a reasonable doubt. *See Jacks I*, 651 F.2d at 487.

Moreover, any possible ambiguity in State's Instruction No. 5 was cleared up when placed in the context of the entire instructions read to the jury. As the court explained in *Jacks I*:

> [T]he trial court read 34 instructions to the jury. In reading the indictment in Court Instruction No. 1 as to first degree murder, of which Jacks was ultimately convicted, the court noted that the grand jury indicted petitioner for "unlawfully, feloniously, *purposely* and maliciously, and with premeditated malice" murdering his wife. He told the jurors in his Instruction No. 2 that the burden was upon the State "to prove all of the material allegations of the indictment, beyond a reasonable doubt."
>
> In his Instruction No. 3, he read the Indiana statute defining murder in the first degree as applying to "Whoever purposely and with premeditated malice . . . kills any human being." Then the court read its Instruction No. 4 that "a Defendant is presumed to be innocent until the contrary is proved. When there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted."
>
> *In the Court's Instruction No. 5, jurors were told that in order to find petitioner guilty of murder in the first degree, the State must establish by proof "beyond a reasonable doubt that the crime charged against the Defendant was committed by him purposely and with premeditated malice" and that "purposely" means intentionally and designedly. The Court's Instruction No. 12 advised the jury that the use of a deadly weapon does not necessarily imply the requisite malice "unless such deadly weapon was intentionally used in such a manner as was calculated to or was likely to cause death . . . ."*
>
> Again, in Court's Instruction No. 14, the jury was advised that the jurors must "endeavor to reconcile all the evidence in the light of the presumption of innocence, if it is possible so to do," and that the presumption of innocence alone "is sufficient to ac-

quit a Defendant, unless you are satisfied beyond a reasonable doubt of the Defendant's guilt from all the evidence in the case."

In Court's Instruction No. 15, the jurors were reminded that the burden of proof was upon the State "to prove the Defendant guilty beyond a reasonable doubt" and that "the evidence in the case must produce in your own mind such a firm belief of guilt that you would be freely willing to act upon that belief in any matter of the highest concern and importance to your own dearest interest." *They were also told that because of defendant's plea of not guilty by virtue of unsound mind, the burden was upon the State "to prove beyond a reasonable doubt that the Defendant was sane at the time the crime charged was committed"* (Court's Instruction No. 18).

The Court's Instruction No. 20 further protected this petitioner because the jury was instructed that a person must be found not guilty even if "he had the mental capacity to appreciate the wrongfulness of his conduct" if at that time his mind was "so affected as a result of mental disease or defect that he lacked substantial capacity to conform his conduct to the requirements of law."

651 F.2d at 486-87 (emphasis added). In short, *Francis* involved the application of the same principles applied in *Jacks I* to a different set of jury instructions. *Francis* does not constitute an intervening change in the law calling into question the constitutionality of Jacks' conviction.

Accordingly, the district court's decision dismissing Jacks' third habeas corpus petition is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 2, 1988

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. HUBERT L. WILL, *Senior District Judge* *

EDWARD DENNIS JACKS, JR.,

Petitioner-Appellant,

No. 87-1327 *v.*

JACK DUCKWORTH, Superintendent, Indiana State Prison, and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 86-C-460—**Allen Sharp**, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, Eastern Division, is sitting by designation.

APPENDIX C

[Dated January 22, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

EDWARD DENNIS JACKS, JR.,
Respondent,

v.

No. S 86-460

JACK DUCKWORTH, Superintendent,
Indiana State Prison, and
INDIANA ATTORNEY GENERAL,
Respondents.

MEMORANDUM AND ORDER

The petitioner, James Edward Jacks, Jr., appearing by counsel again seeks relief under 28 U.S.C. § 2254. The published opinion thus far will give most if not all the relevant history. *See Jacks v. State*, ____ Ind. ____, 394 N.E. 2d 166 (1979); *Jacks v. Duckworth*, 486 F. Supp. 1366 (N.D. Ind. 1980), aff'd, 651 F. Supp. 480 (7th Cir. 1981), *cert. den.*, 102 S. Ct. 1010 (1982), *reh. den.*, 102 S. Ct. 2262 (1982).

Subsequent to all of the above a second bite of the § 2254 apple was sought here on June 17, 1983, by the filing of another petition on June 17, 1983, under Cause No. S 83-171. This court denied relief on November 28, 1983 and an appeal was taken. An effort to appeal was taken and on March 29, 1984 the Court of Appeals Panel consisting of Judges Bauer, Eschbach and Posner stated:

EDWARD DENNIS JACKS, JR.,
Petitioner-Appellant,

No. 83-3243 v.

JACK DUCKWORTH, Warden,
Indiana State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 83 C 271
Allen Sharp, *Judge*.

ORDER

Petitioner, Edward Dennis Jacks, filed a petition for a writ of habeas corpus, 28 U.S.C. § 2254, alleging that the jury instructions given at his trial impermissibly shifted the burden of proof to the defendant on the issue of intent. Petitioner is no stranger to this court, having presented the exact same issue in a previous habeas petition. The denial of that petition was affirmed by the court. *Jack v. Duckworth*, 651 F. 2d 480 (7th Cir. 1981) *cert. denied*, 102 S. Ct. 1010 (1982).

In *Jacks v. Duckworth*, this court concluded that the instructions did not impermissibly shift the burden of proof to the defendant, and, in the alternative, that, even if the instructions did shift the burden of proof, the error was harmless. Since our decision in *Jacks*, the Supreme Court rendered its decision in *Connecticut v. Johnson*, 103 S. Ct. 969 (1983). In *Connecticut v. Johnson*, the Court found that, in general, the giving of instructions that unconstitutionally shift the burden of proof may not be treated as harmless error. Thereafter, Jacks returned to the district court with a new habeas petition asking for reconsideration of his jury instruction issue in light of *Connecticut v. Johnson*.

The district court gave two reasons for denying the habeas petition. The district court found the petition to be successive petition and dismissed on that basis. Rule 9(b), Rules Governing Section 2254 Proceedings in the United States District Courts. In the alternative, the district court reached the merits of peti-

> tioner's claim finding, once again, that the instructions did not impermissibly shift the burden of proof. The district court denied the habeas petition and refused to issue a certificate of probable cause.
>
> Petitioner filed an application in this court for issuance of a certificate of probable cause. In consideration of the fact that this court has previously determined that the instructions did not unconstitutionally shift the burden of proof, and, in view of the fact that this court's harmless error analysis was an alternative holding, we find no substantive issue for review. Accordingly, the request for a certificate of probable cause is denied. Appellee's motion to strike the appellant's brief is granted.

On August 13, 1986, this petitioner, by counsel, has filed yet another petition seeking relief under 28 U.S.C. § 2254.

This court now takes full judicial notice of the entire record above referred to. The state record has again been filed and has been examined under the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963).

Rule 9(b) of the Rules Governing Section 2254 Actions provides:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In *Kuhlmann v. Wilson*, ____ U.S. ____, 106 S. Ct. 2616, 2627 (1986), Justice Powell stated:

> In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was

> proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though—as argued in this case—the evidence of guilt may have been unlawfully admitted. (footnotes omitted).

It is of no small moment that the brief filed by very able and experienced counsel on December 31, 1986, failed to mention *Kuhlmann* although the same was decided June 26, 1986, and first appeared in the Supreme Court Reporter Advance Sheet on July 31, 1986. (In fairness, it was also overlooked by the respondents.)

Kuhlmann is determinative here and requires the denial of this third petition under § 2254.

Here as there, the constitutional claim argued does not itself raise any question of innocence first defined by the late Judge Friendly and now imbedded in § 2254 jurisprudence by the Supreme Court of the United States.

The petition is now DENIED. SO ORDERED.

DATED January 22, 1987.

/s/ ALLEN SHARP
Chief Judge,
United States District Court.

cc: Echeles
Steiner
Order book

APPENDIX D

Summary Of Evidence Respecting Defendant's Mental State

Medical Evidence

Psychiatrist Dr. John R. Adams (defense-employed), opined, based on identifiable facts, (Tr. 725-26, 787, 796-97), that at the time of the occurrence, defendant's capacity to conform his behavior to the requirements of the law was impaired as a result of a mental disease or defect [hysterical neurosis, dissociative type]. (Tr. 743-44)

Psychiatrist Dr. Robert Yuhn (court-appointed, Tr. 866-68), opined that at the time of the offense, defendant was unable to control himself and could not conform to the expectations of society and the law as a result of a mental defect. (Tr. 878) (Detailed results of his examination—Tr. 869-76)

Psychiatrist Dr. A.J. Urruti (State-employed), whose sole contact with defendant was a single 2½ hour interview, 9 months after the occurrence, (Tr. 803, 815), opined defendant was sane, (Tr. 803)—albeit in his opinion, defendant's control over his actions was diminished and his judgment impaired, (Tr. 805), and he was not normal. (Tr. 806) [Dr. Urruti was unaware of much of the evidence, (Tr. 811-14), some of which (admittedly) could have affected his diagnosis. (Tr. 813)]

Dr. Frank Hogle (rebuttal, State) had "no opinion" as to defendant's sanity, (Tr. 827), but openly acknowledged his substantial doubts as to whether defendant was sane at the time at issue. (Tr. 831)

Court-appointed practitioner Dr. George S. Westfall testified briefly (Tr. 850-63) to his opinion that defendant was not insane at the time of the homicide, (Tr. 854)—but, like Dr. Urruti, offered no factual bases for his opinion.

Lay Evidence

Additionally, considerable evidence from lay persons familiar with defendant and with the circumstances of his life just prior to the homicide provided factual bases for the conclusion that defendant was not legally responsible for his conduct at the time in question. In the interest of brevity, this evidence will not be recounted fully here; suffice to note, it reflects a man who talked of suicide, whose life has just fallen apart—in the throes of a "messy" divorce including child custody battles, and severe business setbacks. See *Jacks III*, 827 F.2d at 395.

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1051

(2)

IN THE

Supreme Court of the United States

October Term, 1988

EDWARD DENNIS JACKS, JR.,

Petitioner,

vs.

JACK DUCKWORTH, Superintendent,
Indiana State Prison, and
INDIANA ATTORNEY GENERAL

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, on a successive habeas corpus petition, Jacks was entitled to a redetermination of the merits of his claim concerning the admission into evidence of his request for an attorney during police questioning where the Seventh Circuit had previously determined that any error in the evidentiary use of the attorney request amounted to harmless error in the particular circumstances and where there had been no intervening change in the law regarding such harmless error determination.

2. Whether, on a successive habeas corpus petition, Jacks was entitled to a redetermination of the merits of his claim concerning certain instructions which were given at trial where the Seventh Circuit had previously rejected Jacks' claim that the instructions impermissibly shifted the burden of proof on intent issues and where there had been no intervening change of law affecting this determination.

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No. 88-1051

IN THE

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INDIANA ATTORNEY GENERAL

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Jack R. Duckworth, and Indiana Attorney General, respectfully pray this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"), thereby refusing to review the decision entered by that Court in Cause Number 87-1327 on September 13, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana, entered on September 26, 1979, is reported at 394 N.E.2d 166.

The memorandum and order of the United States District Court for the Northern District of Indiana, South Bend, Division (hereinafter "District Court"), Cause Number S79-308, is reported at 486 F.Supp. 1366.

The opinion of the Seventh Circuit on Jacks' first habeas corpus appeal, is reported at 651 F.2d 480 (1981). The denial of certiorari regarding the Seventh Circuit's opinion in 1981 is reported at 102 S.Ct. 1010 (1982), and the denial of a request to file a petition for rehearing in this Court is reported at 102 S.Ct. 2262 (1982).

The Memorandum and Order of the District Court in Cause Number S86-460, which was the second successive habeas corpus petition and the petition culminating in Jacks' present request for review by this Court, appears as Appendix C to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Petition").

The Opinion of the Seventh Circuit, which is the subject of Jacks' request for review, is reported at 857 F.2d 394 and appears as Appendix A to the Petition.

JURISDICTION

The Respondents accept the Jurisdictional Statement of the Petitioner.

STATEMENT OF THE CASE

I.

Nature of the Case

The Petition arises from the affirmance of a judgment and decision of the District Court denying a second successive petition for a writ of habeas corpus filed by Edward Dennis Jacks, Jr., a person in state custody. Petitioner alleges that the Seventh Circuit erred in failing to redetermine its findings that the evidentiary use of petitioner's request for an attorney during police questioning was harmless beyond a reasonable doubt and that certain instructions did not impermissibly shift the burden of proof on intent issues.

II.

COURSE OF PROCEEDINGS BELOW

Petitioner, Edward Dennis Jacks, Jr., is a state prisoner who is presently incarcerated at the Indiana State Prison pursuant to his conviction for the first degree murder of his wife. Petitioner Jacks was found guilty following a jury trial in November, 1976, and was sentenced to life imprisonment. Jacks appealed his conviction to the Indiana Supreme Court raising the claims that are again the subject matter of this proceeding. The Indiana Supreme Court affirmed Jacks' murder conviction in September, 1979, and denied rehearing in November, 1979. *See Jacks v. State*, 394 N.E.2d 166 (Ind. 1979). Shortly thereafter, the Petitioner sought a writ of habeas corpus from the District Court raising, among other issues, the very same claims that he is seeking to raise for a second and even third time here. In a published opinion, dated April 11, 1980, the District Court rejected Jacks' claims on the merits and accordingly denied a writ. *Jacks v. Duckworth*, 486 F.Supp. 1366 (N.D. Ind. 1980). Jacks appealed the denial of his petition, and the Seventh Circuit affirmed the decision of the District Court, specifically finding that Jacks had not been deprived of his constitutional rights as a result of the evidentiary use of any of his comments to the police or the giving of the instructions in question here to the state criminal trial jury. *Jacks v. Duckworth*, 651 F.2d 480 (7th Cir. 1981), *Rehearing and Rehearing En Banc denied* August 14, 1981. Petitioner Jacks sought a writ of certiorari. This Court, however, denied certiorari on January 11, 1982, and also denied Jacks' request to file a petition for rehearing on May 17, 1982. *Jacks v. Duckworth*, 102. S.Ct. 1010 (1982); *Jacks v. Duckworth*, 102, S.Ct. 2262 (1982).

Jacks' previous efforts at relief did not end in 1982, however. On June 17, 1983, Jacks again filed a petition for writ of habeas corpus (No. S83-271), attempting to relitigate the instruction issue because of an alleged change of law. In the Memorandum and Order, dated November 28, 1983, the District Court determined that the petition was a successive petition under Rule

9(b), Rules Governing § 2254 Actions in the United States District Courts, and denied relief on that basis. A certificate of probable cause to appeal was denied twice by the District Court (on December 16, 1983 and December 30, 1983), and the Seventh Circuit also denied a certificate of probable cause for an appeal on March 29, 1984.

In his latest habeas petition, which was filed before the District Court on August 13, 1986, Jacks sought to raise three (3) issues which were previously fully litigated and determined against him. This time around, Jacks raised the issues, as follows:

> 1. Whether a statement made by petitioner, drawing attention to his request for counsel, violated his constitutional rights.
>
> 2. Whether a statement by petitioner drawing attention to the exercise of his right to remain silient violated his constitutional rights.
>
> 3. Whether jury instructions deprived petitioner of a fair trial in violation of constitutional due process guarantees.

There is no dispute here that these issues were not new in any way. As noted above, Jacks previously claimed that his Sixth and Fifth Amendment rights were violated by the playing to the jury of a statement by Jacks to Sergeant Miller that "as regards to what happened this evening, I want to talk to my attorney." A review of Jacks issues and related material unquestionably demonstrate that they present the identical legal and factual issues previously litigated. Similarly, Jacks' present complaint concerning Court's Instruction No. 13 and State's Instruction No. 5 are the identical complaint, raising the same legal and factual matters, which was decided against Jacks in two separate proceedings.

Following a Response to the Order to Show Cause, other briefing and filing of the state record, the District Court issued its Memorandum and Order on January 22, 1987, and Judgment on January 23, 1987, denying a writ of habeas corpus.

Jacks filed his Notice of Appeal, and the District Court granted a certificate of probable cause, allowing an appeal, on February 26, 1987.

On the appeal, the Seventh Circuit determined that there was no basis for redetermining the merits of Jacks' claims because there had been no change of law vitiating the previous decision of that court.

III.

STATEMENT OF THE FACTS

Throughout this Brief, the Record of the Proceedings in the state courts will be cited as "R".

Jacks came home from a trip to Georgia and was told by his wife, Kathy, that she had filed for divorce. (R. 685). Kathy took their children to an apartment she had rented. (R. 685). On August 28, 1975, the day after Petitioner returned from his trip, Kathy went back to her home, where Petitioner was staying. (R. 373). Kathy took Pat Munson along with her, and Pat telephoned Jacks to tell him that they were coming. (R. 374). Kathy, her children and Pat drove to Petitioner's house, and Kathy went up to the door. (R. 381-382). Jacks opened the door with an assault rifle in his hands and shot Kathy. (R. 382). When Petitioner turned the rifle toward Pat, she ran for her car. (R. 383). Petitioner shot one of Pat's tires out and then pointed the rifle at her windshield, as she backed her car out of the driveway. (R. 384). Kathy died as a result of the shooting. (R. 411, 568).

At the trial, in addition to Pat Munson, the State called a number of witnesses who observed Petitioner near the time of the shooting. Mark Miller and Harvey Miller, two ambulance attendants (R. 393, 400) arrived at the scene after the shooting (R. 393) and testified as to several commments made by Petitioner indicative of his sanity. (R. 395-396, 398, 401). Officer Snyder arrived at the scene, shortly after the shooting, and called for an ambulance. (R. 418). He heard Petitioner tell the

firemen not to touch his wife as they were not doctors, but Snyder told him that she had to go to the hospital. (R. 418-419). He and Petitioner went inside, and Petitioner made a phone call. (R. 421). Jammed cartridges were found at the scene. (R. 464-465).

Barbara Best, Jacks' neighbor, heard Petitioner tell her dad before the shooting that when the policemen came to serve papers there might be trouble. (R. 485). She went to the scene after the shooting. (R. 486-487). Ronnie Greenawalt, who knew Jacks, testified as to his contacts with Petitioner before the shooting. Jane Yoder, Jacks' neighbor, testified that Petitioner, before the shooting, asked her to keep her kids away. (R. 520). Petitioner said he might blow his wife's head off and said his parents were flying down to restrain him. (R. 520). Ted Cover, another neighbor, noticed that Petitioner was relatively calm just after the shooting. (R. 532).

Petitioner told two officers, Bousson and Sharon, that the shooting had been accidental. (R. 539, 545). Officer Bousson heard Jacks on the telephone explaining that he was in trouble and needed help. (R. 538). Later, at the booking room of the police station, Petitioner told Officer Linton: "I shot my wife" and "I want to know how she is." (R. 548).

Kathryn Brown, an EEG technologist who was involved in pretrial testing of Jacks relating to his insanity defense, testified that Petitioner told her he was back for a second test because " . . . his attorney had wanted to 'go the insanity route,' and he didn't want to go along with that." (R. 822).

Dr. Urruti and Dr. Westfall examined Petitioner as to his mental condition and testified at trial that in their opinions he was sane and could form the requisite intent at the time of the crime. (R. 798-804, 851-856).

During the trial, a tape of a conversation between Officer Miller and Petitioner was played to the jury. (R. 592-596). Prior to trial, Petitioner had moved to suppress this tape, and a hearing was held. (R. 342-362). Additional discussion occurred

at trial, and the trial judge granted the motion to suppress, in part. (R. 554-555). Throughout proceedings below, the Petitioner has only objected to the playing of the final comment he made on the part of the tape allowed into evidence at trial.

Petitioner objected to the giving of State's Instruction No. 5 at trial but did not object to the giving of Court's Instruction No. 13. (R. 906, 908-909). The Supreme Court of Indiana specifically determined that Petitioner waived any issue with respect to Court's Instruction No. 13 by failing to make a contemporaneous objection as required by Indiana procedural rules. *Jacks v. State*, 394 N.E.2d 166, 173 (Ind. 1979). The Petitioner, throughout the proceedings in the federal courts below, has made no effort to show the requisite cause and prejudice to avoid the waiver determination. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

REASONS FOR DISALLOWANCE OF THE WRIT

No Substantial Question for Review of Jacks' Second Successive Habeas Corpus Petition has been presented because the basis for previous decisions of the federal courts regarding Jacks' claims have not been affected by subsequent decisions of this Court.

A. Attorney Request Issue

Most of Jacks' argument in his certiorari petition focuses upon this Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), which was decided after the original decision of the Seventh Circuit. *See Jacks v. Duckworth*, 651 F.2d 480, 488-90 (7th Cir. 1981), *cert denied*, 454 U.S. 1147 (1982). Jacks' argument fails to appreciate the fact that the Seventh Circuit's original decision had two bases. While it is correct that *Wainwright v. Greenfield* vitiated the Seventh Circuit's position that a person's post-*Miranda* warning request for counsel soon after the commission of the crime was admissible to show the defendants' sanity at the time of the crime, this Court's decision in *Wainwright v. Greenfield* did not affect or in anyway vitiate

the Seventh Circuit's determination that any error in the evidentiary use of the attorney request had been harmless beyond a reasonable doubt. Contrary to Jacks' claim (at p. 13 of the Petition), the Seventh Circuit's "harmless error" determination is not at odds with *Wainwright v. Greenfield* or the other Court of Appeals decisions which he cites (at pp. 18-19 of his Petition).

Wainwright v. Greenfield certainly did not prohibit a harmless error rationale for affirming a conviction even if the kind of problem discussed in that case or *Doyle v. Ohio*, 96 S.Ct. 2240 (1976) occurred. *Id.*, 106 S.Ct., at 640-641, footnote 13. What Jacks wishes to obfuscate is that there has been no change of law concerning such harmless error determinations. Rule 9(b), Rules Governing § 2254 Actions in the United States District Courts relevantly provides, as follows:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . .

The District Court and the Seventh Circuit certainly had discretion to deny Jacks' demand that the attorney request issue be reconsidered since the harmless error determination had not been affected by *Wainwright v. Greenfield*. Jacks has not shown that the "ends of justice" would be served by re-examination of the attorney request claim since there has been no change of law or fact affecting the previous determination. *See Kuhlman v. Wilson*, 106 S.Ct. 2616 (1986); *Sanders v. United States*, 373 U.S. 1 (1963). There is just no reason for this Court to mandate reconsideration of the attorney request issue.

The reasoning utilized by the Seventh Circuit concerning this matter is certainly sound. Contrary to Jacks' assertion that the Seventh Circuit has misunderstood the meaning of *Wainwright v. Greenfield*, the circuit court's most recent decision in Jacks' case demonstrates not only understanding but proper application of *Wainwright v. Greenfield*. For example, the Seventh Circuit observed that "[u]nder *Wainwright*, there is no doubt that the admission of Jacks' statement that '[a]s regards

whatever happened this evening, I want to talk to my attorney,' constituted a due process violation." Petition App. 13. While recognizing that *Wainwright v. Greenfield* constituted an intervening change of law, the Seventh Circuit also quite properly recognized that this intervening change of law did not affect the validity of Jacks' conviction because of the harmless error determination. (Petition App. 13).

It was appropriate for the Seventh Circuit to rely on its harmless error determination. Indeed, the Circuit Court did not merely rely upon its previous harmless error determination but stated that even if it were appropriate to revisit the harmless error analysis, their conclusion would be the same. Petition App. 14. The Seventh Circuit observed that:

> The admission into evidence of the challenged statement was harmless beyond a reasonable doubt. See *Fencl v. Abrahamson*, 841 F.2d 760 (7th Cir. 1988). Jacks' statement that "[a]s regards whatever happened this evening, I want to talk to my attorney," was simply one of many lucid statements made by Jacks in the portion of the taped conversation admitted into evidence. In addition, the prosecutor did not dwell on this statement in closing argument but rather mentioned the statement along with all the other statements made in the admitted portions of taped conversation. More important, the taped conversation was simply a small portion of a large amount of evidence going to the issue of Jacks' sanity. The State presented the testimony of eleven lay witnesses that indicated that Jacks was sane before, during, and after the shooting. Two experts testified that in their opinions, Jacks was sane and capable of forming the requisite criminal intent at the time of the shooting. An electroencephalogram technologist testified that, upon his return for a second electroencephalogram, Jacks told her that the first test did not show his insanity as his counsel had hoped and that he did not want to go along with an insanity defense. To counter the State's case, Jacks presented a considerable amount of probative evidence designed to show he was insane at the time of the shooting, including his own testimony and the testimony of two experts who

> testified that, in their opinions, Jacks was incapable of forming the requisite criminal intent. Jacks also argued that much of the State's evidence reinforced this conclusion. In short, the challenged statement was a small part of a taped conversation which was in turn a small part of the entire evidence on the issue of insanity. While it was error to admit the statement, its admission was harmless error.

(Petition App. 14-15).

There is simply no substantial basis for this Court to review the Seventh Circuit's harmless error determination.

B. Instruction Issue

In the original decision of the Seventh Circuit, it was determined that the instructions given at Jacks' criminal trial did not impermissibly shift the burden of proof on intent issues to the defense. *See Jacks v. Duckworth*, *supra*, 651 F.2d at 485-487. This was the primary basis for rejecting Jacks' instruction claim. Consequently, when Jacks attempted to relitigate the instruction issue in 1983, based upon comments in *Connecticut v. Johnson*, 103 S.Ct. 969 (1983) concerning harmless error, the District Court dismissed the successive petition, and the Seventh Circuit denied a certificate of probable cause because any comment concerning harmless error in the original decision of the Seventh Circuit had merely been an alternative rationale for denying a writ on the instruction issue. Contrary to any such contention by Jacks, *Connecticut v. Johnson* certainly did not amount to an intervening change in the law warranting relitigation of the instruction claim.

Similarly, the Seventh Circuit correctly determined that *Francis v. Franklin*, 471 U.S. 307 (1985) did not amount to an intervening change of law warranting reconsideration of the instruction issue. *See* Petition App. 15-19. This Court made it clear in *Francis v. Franklin* that no significant change in the law was represented by that case. This Court in *Francis v. Franklin* followed principles which had previously been articulated in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and princi-

ples applied by the Seventh Circuit in its initial opinion in Jacks' case. *Jacks v. Duckworth*, *supra*, 651 F.2d at 485-487. As observed by the Seventh Circuit in its most recent Jacks' opinion, *Francis v. Franklin*, following the *Sandstrom* precedent, concluded that a certain set of instructions " . . . violated due process because they created a mandatory rebuttable presumption on the issue of intent that shifted the burden of persuasion on the intent issue to the defendant", citing *Francis*, 471 U.S. at 318. *See* Petition App. 15-16.

After pointing out that this Court in *Francis v. Franklin* did not deviate from *Sandstrom* or principles in *Cupp v. Naughten*, 414 U.S. 141 (1973) (which held that particular instructions must be examined in the context of all the instructions given to the jury), the Seventh Circuit reiterated its holding in its original decision in Jacks' case. Rather than reiterate the reasoning of the Seventh Circuit, the Respondent incorporates by reference the comments made by the Seventh Circuit at pages 16 through 19 of its opinion. *See* Petition App. 16-19.

The Seventh Circuit recognized that the instruction condemned in *Francis v. Franklin* used different language than the instructions at issue in Jacks' case. Compare instruction in *Francis*, at 105 S.Ct. 1969-1970 with the instructions given at Jacks' trial. See Petition, pp. 7-8. The instructions in *Francis* were mandatory but rebuttable by the defendant, thereby relieving the prosecution of the burden of proof on the intent issues. 105. S.Ct. 1972-1973. As noted by this Court, "When combined with the immediately preceding mandatory language, the instruction that the presumptions 'may be rebutted' could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted." 105 S.Ct. at 1973. As further noted by the Court:

> The very statement that the presumption "may be rebutted" could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the

> presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent. (105 S.Ct. at 1974)

The language "may be rebutted", implying a duty to rebut by the defendant presents entirely different qualifying language than in *Jacks*, where the previous decisions have carefully described why the instructions did not shift the burden of persuasion on the intent issues. The Seventh Circuit carefully examined all of the instructions along with those instructions which were challenged by Jacks. There is no substantial reason for this Court to review the decision of the Seventh Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be denied.

Respectfully submitted,

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No. 88-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD DENNIS JACKS, JR.,

Petitioner,

v.

JACK DUCKWORTH, Superintendent, Indiana State Prison, and INDIANA ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

I.

The gist of Respondents' Brief in Opposition is that none of the "new law" relied upon by Petitioner (hereafter, Defendant), impacts upon the "harmless error" determina-

tion of the Seventh Circuit. But this position disregards the simple truth that when that Court first determined [in *Jacks I—Jacks v. Duckworth*, 651 F.2d 480 (7 Cir. 1981)] that the constitutional error, if any, was "harmless," the prevailing law in the Seventh Circuit[1] was that a defendant's invocation of right to counsel was regarded as proper evidence of sanity. Thus, the initial "harmless error" determination was made in the context of a judicial climate that completely condoned such evidence and argument.[2] In such a climate, we submit, the "harmless error" determination was necessarily skewed by the tribunal's belief that no error had, after all, been committed. And the subsequent "harmless error" finding at bar is merely a "rubber-stamp" of the original one.

Now that Your Honors, in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), have determined that such use of a defendant's invocation of constitutional right to counsel violates due process of law, defendant is entitled to have his claim of constitutional error assessed by a tribunal not predisposed to find the error harmless because in reality it believes no error has occurred at all.

It appears painfully evident that no meaningful determination whether the error is harmless ever has been af-

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[1] Interestingly, had Defendant's initial habeas petition been presented within a federal judicial Circuit such as the Sixth or Eleventh, instead of the Seventh, he would long ago have been afforded relief. See *Wainwright v. Greenfield*, 474 U.S. 284, 289 n.4 (noting conflict in Circuits); 6th and 11th Circuit decisions cited at p. 19 of Petition for Certiorari.

[2] Similarly, when the Indiana Supreme Court resolved the instructional issue against Defendant, it did not mention *Sandstrom*, which was decided while Defendant's appeal was pending. See fn. 4, p. 3, *infra*.

forded Defendant. Although, as Respondents point out, the intervening decisions do not directly alter the law *re* "harmless error," any harmless error determination is necessarily affected by whether the tribunal making the determination comprehends that the error is indeed a grave, constitutional error.

We are constrained to remind that the laypersons on the jury must have been persuaded by the unconstitutional evidence and argument,[3] that defendant was sane, based on his invocation of right to counsel. This is unconscionable.

II.

Respondents fail to comment on defendant's position that the Seventh Circuit's decision in his case puts that Court in conflict with the Sixth and Eleventh Circuits. (See Pet. pp. 18-19.) In those Circuits, the instructional error cannot be harmless in the insanity context.

III.

Respondents fail to consider the interrelationship between the two constitutional errors claimed by defendant,[4] treat-

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[3] It must be remembered that not only was the unconstitutional evidence presented; the prosecutor argued that defendant's invocation of right to counsel demonstrates his sanity. (Tr. 611).

[4] As to the instructional issue, Respondents point out that not all the instructions complained of were objected to at the time. (Br. in Opp. p. 7) See Pet. p. 16, fn. 18 for "anticipatory reply." Additionally, the Indiana trial court had admonished counsel not to make any more objections, which must operate to nullify any "waiver" principle.

Moreover, although Defendant called *Sandstrom* to the Indiana Supreme Court's attention, that Court did not mention *Sandstrom v. Montana*, 442 U.S. 510 (1979), which was decided while Defendant's direct appeal was pending and before the Indiana Supreme Court affirmed. *Jacks v. State*, 271 Ind. 611, 394 N.E.2d 166 (1979).

ing each as if in a vacuum for purposes of discussion—even of the "harmless error" aspects of the case. (See Pet. pp. 19-20.)

IV.

In determining whether the constitutional error(s) at bar can be deemed "harmless," this Court should consider the content of the expert testimony (see Pet. App. D, p. App. 25), supporting a finding that defendant was not sane (*i.e.*, not criminally responsible), to assess whether the pro-sanity evidence logically outweighed the insanity evidence, or whether—as we maintain—the verdict of guilty (*i.e.*, determination of sanity) was influenced by the jury's exposure to evidence and argument that defendant invoked his right to counsel.

While the psychiatrists who opined defendant was insane based their opinions on identifiable facts, (see Dr. Adams, Tr. 725-26, 787, 796-97; Dr. Yuhn, Tr. 869-78), no such factual bases were testified to for the sanity opinions of the other doctors. (Dr. Urruti, a psychiatrist, and Dr. Westfall, a general practitioner, did not testify to any factual bases for their opinions). And Dr. Hogle, a psychiatrist, who had "no opinion" as to defendant's sanity, had substantial doubts whether he was sane at the relevant time.

Considering the appropriate weight these opinions should be afforded when judged by the factual bases (or lack thereof) to which the respective doctors testified, the Seventh Circuit's harmless error determination[5] cannot be upheld.

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[5] Of course, the applicable standard for whether a constitutional error can be deemed "harmless" is whether the prosecution has proven "beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

CONCLUSION

For the reasons advanced in the Petition for Certiorari, as amplified in this Reply, certiorari should be allowed; and, on the merits, this Court should issue the Great Writ of Habeas Corpus.

Respectfully submitted,

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